U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JUN 05 2013 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and information technology services business. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a master's degree, or foreign educational equivalent, in computer science, engineering, or related field, or the alternative requirement of a bachelor's degree and five years of progressive experience in the specialty field.

On appeal, counsel asserts that the beneficiary does possess a bachelor's degree and five years of progressive experience in computer science, engineering, or related field and submits a third credential evaluation to support his claim. The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The beneficiary possesses a foreign three-year bachelor's degree from in India and certificates from the Thus, the issue is whether the degree and certificates are a foreign degree equivalent to a U.S. baccalaureate

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is

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[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Because the beneficiary has neither (1) a U.S. master's degree or foreign equivalent degree in computer science, engineering, or a related field, nor (2) a U.S. baccalaureate degree or foreign equivalent degree in computer science, engineering, or a related field and five years of progressive experience in the specialty or as a programmer, programmer analyst, systems analyst, or any related field, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien,

> and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309. The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Here, the ETA 9089, Part H shows that the position requires a master's degree, or foreign educational equivalent, in computer science, engineering, or a related field. The petitioner will also accept a bachelor's degree and five years of experience in the specialty fields or as a programmer, programmer analyst, systems analyst or in any related field.

The record of proceeding contains a copy of the beneficiary's Bachelor of Commerce degree and transcripts from and copies of the beneficiary's certificates from The record contains the following educational evaluations of the beneficiary's credentials:

- An evaluation prepared by on June 10, 2011. The evaluation concludes that the beneficiary's Bachelor of Commerce degree from is equivalent to three years of academic coursework at an accredited institution of higher education in the United States. The evaluation also states that when combining the beneficiary's education with his work experience, the beneficiary possesses the equivalent to a Bachelor of Science in Computer Information Systems and a Master of Science in Computer Information Systems from an accredited institution of higher education in the United States.

- An evaluation prepared by on December 16, 2011. The evaluation concludes that the beneficiary's three-year degree, when combined with training from the and work experience is equivalent to a master's degree in computer information systems.
- An evaluation prepared by on April 20, 2012. The evaluation concludes that the beneficiary's Bachelor of Commerce degree is equivalent to a bachelor's degree in business from an accredited university in the United States.

Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a degree rather than a full U.S. degree or foreign equivalent degree as required by the labor certification.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). However, in the instant case, the three evaluations submitted by the petitioner reach three separate conclusions and thus, are not persuasive. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/about-AACRAO.aspx (accessed January 7, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions.

Rather, they must work with a publication consultant and a Council Liaison with AACRAO's

National Council on the Evaluation of Foreign Educational Credentials.[3] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[4] In the section related to the Indian educational system, EDGE provides that a three-year Bachelor of Commerce degree "represents attainment of a level of education comparable to two to three years of university study in the United States. Credit may be awarded on a course-by-course basis."

We have also reviewed AACRAO's Project for International Education Research (PIER) publications: the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997) (PIER India). We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. *The P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual. In the 1997 PIER India publication on page 46, it states that the [redacted]itle, within the [redacted] system, is primarily a vocational/technical qualification, and that the entrance requirement is a class/Grade XII certificate.

The AAO accessed [redacted] website to determine what type of educational services it provides. See [redacted] (accessed January 7, 2013). [redacted] offers a career program [redacted] an engineering technology program (Edgeineers), which "helps engineering students and engineering graduates get acquainted with high-end technologies and meet requirements across their academic lifecycle;" networking and infrastructure management programs; basic computer programs; and short-term technology programs. *Id.* The website does not indicate that [redacted] requires a college degree in order to admit a

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[3] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

[4] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

student to any of these programs. Further, there is no evidence that the beneficiary's admission to was predicated upon the completion of a bachelor's degree program.

The evidence in the record is not sufficient to establish that the beneficiary possesses a U.S. bachelor's degree or a foreign equivalent degree as required by the terms of the labor certification. Accordingly, on January 14, 2013, the AAO issued a request for evidence and notice of intent to dismiss (RFE/NOID) advising the petitioner of the insufficiencies in the record and requesting that the petitioner submit evidence to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree and five years of progressive experience in the specialty field or as a programmer, programmer analyst, systems analyst or any related field. The AAO provided the petitioner with a copy of the EDGE report and noted that any additional credentials evaluations submitted in response to the RFE/NOID should specifically address the conclusions of EDGE set forth above.

The ETA Form 9089 labor certification also states that the beneficiary qualifies for the offered position based on experience as a Programmer Analyst (SAP) for from September 23, 2006 to October 31, 2009; as a Design Analyst (SAP) for in India from April 18, 2005 to July 7, 2006; and as a SAP Technology Consultant for in India from August 23, 2002 to August April 14, 2005.

The regulation at 8 C.F.R. § 204.5(G)(1) states:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains an experience letter from Vice President, on letterhead stating that the company employed the beneficiary as a Programmer Analyst from September 2006 to October 2009. However, the letter does not describe the beneficiary's duties and the letterhead states that the company is located in New Jersey, but the labor certification listed the location as Atlanta, Georgia.[5] This discrepancy raises doubt about the veracity of the claimed experience. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 582, 591.

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[5] In the response to the RFE/NOID, counsel asserts that "there is a discrepancy of the cities because there was a merger, of the original company in New Jersey, but the entity which it got merged into was in Atlanta." Counsel submits a letter, dated April 28, 2009 from an attorney describing the merger. However, the AAO finds that this letter is insufficient to resolve the inconsistency in the record, as it does not resolve the inconsistency in the record regarding where the beneficiary worked for *Matter of Ho*, 19 I&N Dec. at 582, 591.

In addition, the record contains an experience letter from , Technical Manager on letterhead stating that the company employed the beneficiary from April 2005 to July 2006. However, the letter is dated June 19, 2006, which is a month before the beneficiary's supposed end-date of employment. This discrepancy raises doubt about the veracity of the document submitted. The record also contains an experience letter from Manager, Human Resources, on letterhead stating that the company employed the beneficiary as a Jr. SAP Technical Consultant from August 2002 to April 2005. However, the letter does not discuss the beneficiary's duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

The AAO's RFE/NOID, advised the petitioner that the evidence in the record is not sufficient to establish that the beneficiary possesses five years of experience as required by the terms of the labor certification. We specifically requested the petitioner to submit additional evidence of the beneficiary's experience, including but not limited to updated experience letters that meet the requirements of the regulations.

In its response, dated April 5, 2013, the petitioner submitted a copy of the beneficiary's credentials that were already part of the record. The petitioner did not submit any new experience letters, credential evaluations, or respond to the conclusions of EDGE as had been specifically requested by the AAO. Therefore, the AAO finds that the beneficiary does not possess a "U.S. baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Beyond the decision of the director, in the AAO's RFE/NOID, we noted that the record did not establish that the petitioner has the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The ETA Form 9089 in the instant case was filed on February 2, 2011. The proffered wage listed on the ETA Form 9089 is $82,514 per year.

Here, the record did not contain any evidence of the petitioner's ability to pay, however, in the RFE/NOID, the AAO afforded the petitioner an opportunity to submit additional evidence to establish its continuing ability to pay from the priority date in 2011 onwards. Specifically, we requested the petitioner's annual reports, federal tax returns and/or audited financial statements for 2011 and 2012 and any Internal Revenue Service (IRS) Forms W-2 or 1099 issued to the beneficiary in 2011 and 2012.

The AAO also advised the petitioner that according to USCIS records, it had filed multiple petitions for multiple beneficiaries. The petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). Thus, we specifically requested the petitioner to submit the following information for each beneficiary for whom the petitioner had filed a Form I-140 since the priority date of February 2, 2011 through the date of the RFE/NOID:

- Full name of the beneficiary.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The wage paid to each beneficiary from the priority date of the instant petition (February 2, 2011) to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition (February 2, 2011) to the present.

We further noted that according to USCIS records, the petitioner employs multiple H-1B workers and asked the petitioner to submit the following information for every H-1B worker it has employed since the priority date of the instant petition:

- Full name.
- The receipt number for each Form I-129, Petition for a Nonimmigrant Worker, and a copy of the associated Labor Condition Application.
- Exact dates employed by your organization.
- Title and required H-1B wage.
- The actual wage paid.

- Forms W-2 issued to each H-1B worker from the priority date of the instant petition to the present.

The petitioner did not submit any evidence that it has employed or paid the beneficiary any wages in 2011 or 2012. In its response, counsel asserts that the petitioner has filed 13 Form I-140 petitions as of the priority date through January 14, 2013, the date of the RFE/NOID, and that "*most* of these persons are on its payroll and *are making almost the same salary or more* that the proffered wage." (Emphasis added). In the same response, counsel also states that *all* these employees are on the payroll of the petitioner and "they are making *more* than the proffered wage." (Emphasis added). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

In the RFE/NOID response, the petitioner submitted a list of the 13 beneficiaries for whom it submitted Form I-140 petitions. Although it did not provide all of the requested information, the information listed on a spreadsheet submitted, along with IRS Forms W-2, reflect that the petitioner appears to have paid only five of the sponsored beneficiaries the proffered wage.[6] The petitioner did not provide any information or evidence with regards to its H-1B workers.

In addition, the petitioner submitted its 1120S federal tax return for 2011. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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[6] The petitioner also submitted paystubs issued to some of the beneficiaries in 2012, however, as these wages would have been reflected on the IRS Forms W-2, these will only be considered generally.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). The petitioner's tax return Form 1120S states its net income[7] for 2011 as $54,913, which is insufficient to cover the beneficiary's proffered wage, much less that of the multiple other sponsored beneficiaries..

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown

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[7] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed May 2013) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and/or other adjustments shown on its Schedule K for 2011, the petitioner's net income is found on Schedule K of its 2011 tax return.

[8] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's 2011 tax return Form 1120S demonstrates its end-of-year net current assets for 2011 as $401,802. Therefore, for 2011, the petitioner did not have sufficient net income or net current assets to pay the proffered wage to the beneficiary and the other multiple sponsored beneficiaries.[9] In its RFE/NOID response, counsel states that the petitioner has not filed its 2012 federal tax return, however, the petitioner did not submit any other evidence to establish its ability to pay. Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary in this case and the multiple other sponsored beneficiaries, the proffered wage as of the priority date through an examination of wages paid, its net income, or net current assets.

Lastly, the AAO notes that the duplicate certified ETA Form 9089 submitted with the petition was not signed by the petitioner, the beneficiary, or the attorney who prepared and filed the application. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. *See* 20 C.F.R. § 656.17(a)(1).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[9] In its spreadsheet, the petitioner claims that the proffered wage for the sponsored beneficiaries is $83,761.60 and only submitted IRS Forms W-2 evidencing that it paid the proffered wage to five of the 13 beneficiaries. Therefore its net current assets of $401,802 is insufficient to establish the ability to pay the proffered wage to the beneficiary in this case and all other sponsored beneficiaries.